United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 1403—August Term, 1981
(Argued August 9, 1982 Decided October 13, 1982)
Docket No. 82-7243

EASTERN MICROWAVE, INC.,
Plaintiff-Appellant,

—v.—

DOUBLEDAY SPORTS, INC.,
Defendant-Appellee.

Before:

VAN GRAAFEILAND and PIERCE, *Circuit Judges,*
and MARKEY, *Chief Judge of the U.S. Court of Customs and Patent Appeals.**

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* Chief Judge Howard T. Markey, U.S. Court of Customs and Patent Appeals, sitting by designation.

Appeal from the United States District Court for the Northern District of New York, Honorable Neal P. McCurn, District Judge; District Court No. 81-CV-303.

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MARKEY, *Chief Judge,* United States Court of Customs & Patent Appeals:

Appeal from a judgment of the district court for the Northern District of New York, denying plaintiff's and granting defendant's motion for partial summary judgment, holding that a retransmitter of television signals publicly performed a copyrighted work among those signals and was not an exempt carrier. We reverse.

Background

Plaintiff, Eastern Microwave, Inc. (EMI) is licensed by the Federal Communications Commission (FCC) to provide services as a communications common carrier. EMI's services include the retransmission of the television signals of broadcast stations to markets outside the service areas of the broadcast stations. Retransmission is accomplished by converting broadcast signals into microwave signals and relaying the microwave signals via satellite or a string of line-of-sight terrestrial microwave repeater stations. Retransmitted signals are delivered by EMI to the headends of the customers of its transmitting services, cable television (CATV) systems, which then reconvert the microwave signals to television signals for distribution to and viewing by the CATV system's subscribers.[1]

EMI has been retransmitting the original television signals of WOR-TV of New York City by repeater stations since 1965, and more recently by both repeater stations and satellite. WOR-TV has not objected to that retransmission.

Doubleday Sports, Inc. (Doubleday), owner of The New York Mets baseball team, contracts with WOR-TV to broadcast approximately 100 Mets games per season. It is undisputed that The Mets, i.e., Doubleday, owns the copyright in the audiovisual work represented by the Mets games. Since 1965, EMI has retransmitted the entirety of WOR-TV's signals, without selection among programs and without modification or mutilation in any manner of the signals received and retransmitted. Since 1980, when WOR-TV became a twenty-four hour channel, EMI has retransmitted all twenty-four hours of WOR-TV programming, with no editing or selection among programs.[2] Hence, EMI's retransmission of WOR-TV's television

[1] EMI also delivered its microwave signals to two hotels and a casino in Las Vegas.

[2] Before WOR-TV became a twenty-four hour channel, EMI retransmitted the signals of WCBS-TV, New York, when WOR-TV was off the air.

signals includes the Mets games, along with numerous other copyrighted audiovisual works. EMI did not request permission of Doubleday or of any other copyright owner to retransmit the signals of WOR-TV.

In March of 1981, EMI was notified by Doubleday of the latter's view that retransmission of WOR-TV Mets game broadcasts infringed Doubleday's copyright. Thereupon, EMI instituted this action, seeking a declaratory judgment that it was a passive carrier exempt from copyright liability under 17 U.S.C. § 111(a)(3)[3] of the Copyright Act of 1976 (Act). Doubleday moved for partial summary judgment declaring EMI's retransmissions non-exempt, and for dismissal of the complaint. EMI cross-moved for partial summary judgment denying Doubleday's motion and granting judgment for EMI. EMI amended its complaint, adding a contention that its transmissions are not "public performances" and that it does not therefore infringe Doubleday's right to display the copyrighted works publicly as required by 17 U.S.C. § 106(5).[4]

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[3] 17 U.S.C. § 111(a)(3) provides:

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

(3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; . . .

[4] 17 U.S.C. § 106(5) provides:

Subject to sections 107 through 108, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

The district court, stating that the parties did not dispute that EMI "performs" the WOR-TV signals, held that EMI's retransmissions were to the public, and that EMI is not exempt because it selected WOR-TV's signals, exercised control over recipients of its retransmissions, and did not limit its activities to providing wires, cables, or other communications channels for the use of others. The district court granted Doubleday's motion and denied EMI's.

Issue

The dispositive issue is whether EMI's retransmission activity is exempt under 17 U.S.C. § 111(a)(3), supra, note 3.[5]

Opinion

This case, one of first impression in this circuit, has its genesis in the burgeoning technological advances of the communications industry. Like others before it, the case requires interpretation and application of statutes enacted before adoption of the involved communications arrangements. Because the issues framed by the cross motions for summary judgment involve application of legal standards under the Act to the relatively undisputed facts concerning the nature of EMI's activities, plenary review of the district court's judgment is appropriate. *United Artists Television, Inc.* v. *Fortnightly Corp.*, 377 F.2d 872, 874 n.2 (2d Cir. 1967) *rev'd on other grounds*, 392 U.S. 390, 88 S.Ct. 2084, *reh. denied*, 393 U.S. 902, 89 S.Ct. 65 (1968). *See also Baranow* v. *Gibraltor Factors Corp.* (*In re Hygrade Envelope Corp.*), 366 F.2d 584, 587-89 (2d Cir. 1966).

Confronted with the need to divine and apply the intent of Congress, and with a statute enacted in the technological milieu of an earlier time, we "look to the 'common sense' of the statute . . . , to its purpose, [and] to the practical consequences of the suggested interpretations . . . for what light each inquiry might shed." *New York State Commission on Cable Television* v. *FCC*, 571 F.2d 95, 98 (2d Cir.), *cert. denied*, 439 U.S. 820 (1978).

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[5] The Register of Copyrights filed a brief *amicus curiae* limited to an argument that EMI's retransmission service constitutes a "public performance" of the audiovisual works retransmitted. In view of our disposition, we need not and do not decide that question in this case.

EMI's activities, described as those of an intermediate or "resale" transmitter, are a new and mixed breed. Unlike those of broadcasters and CATV systems, they do not include the sending of signals intended for reception as such on television sets.[6] Like those on some CATV systems, they do include the acquisition "off the air" of broadcast signals. Unlike the activities of older, established common carriers, e.g., the telephone company, they include carrying the communications desired by receivers rather than those desired by senders. Also unlike older common carriers, EMI is paid by receivers rather than by senders. Like those of older common carriers, EMI's activities are paid for as services and involve transmittal of the entire signal without change.

A television broadcast station sends out "on-the-air" signals at frequencies within the broadcast band. Television sets positioned to receive those signals convert them into an audible and visible, i.e. "audiovisual", display. In rendering a retransmission service, the first step is reception of the same "off-the-air" television signals of a broadcast station. The next step of the retransmitter, however, is not conversion into an audiovisual display, but conversion to a frequency within the microwave band. The third step is transportation of the microwave signal. As above indicated, EMI's microwave signal is transported in one of two ways: (1) through a string of line-of-sight terrestrial repeater stations; or (2) directly to a receiver

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[6] EMI transmissions along its string of microwave repeaters are not so receivable. Though not so intended, its satellite transmissions can be received by a growing number of "dishes" and associated equipment purchased by individual homeowners and others. Unauthorized interception of private communications has been held subject to criminal and civil liability. *See National Subscription Television* v. *S & H TV*, 644 F.2d 820 (9th Cir. 1981); *American Television and Communications Corp.* v. *Western Techtronics, Inc.*, 529 F.Supp. 617 (D.Colo. 1982) (microwave transmissions); *Home Box Office, Inc.* v. *Advanced Consumer Technology*, No. 81-Civ. 559 (MDS) (S.D.N.Y. Nov. 4, 1981) (same); *Home Box Office, Inc.* v. *Pay TV of Greater New York, Inc.*, 467 F.Supp. 525 (E.D.N.Y. 1979). See also FCC, *Public Notice, Unauthorized Interception and Use of Multipoint Distribution Service Transmissions*, No. 11850 (January 24, 1979).

dish at the RCA American Communications, Inc. (RCA) earth station uplink site, where it is converted to another microwave frequency, transmitted to an RCA satellite transponder leased by EMI, and relayed by the transponder back to earth. Whichever transporting method is used, the last retransmission step is delivery of the microwave signals to headends of CATV systems, EMI's customers. Distribution of the signals received at a headend, to subscribers for display on their television sets, is a step performed entirely by the CATV system and forms no part of the activities or services of EMI. The retransmission services provided by EMI are thus an intermediate link in an overall chain of distribution of television broadcast signals, a link making broadcast signals originally available in one are available in microwave form at the headends of CATV distribution systems positioned in other areas.

The present activity of EMI cannot be viewed in historical isolation. In 1968, the FCC suspended the hearing process required by its 1966 rules in favor of proposed rules requiring cable systems in the top 100 markets to obtain consent from distant stations before transmitting their signals. *Notice in Docket No. 18397,* 15 F.C.C. 2d 417 (1968). That resulted in denial of virtually all transmission rights, and designation of the action as a "freeze" on cable growth.

At about the same time as the 1968 FCC action, distribution of microwave-relayed television signals by CATV systems to subscribers was held not a "performance" under the Copyright Act of 1909, and CATV systems were therefore not liable for copyright infringement. *Fortnightly Corp.* v. *United Artists Television, Inc.,* 392 U.S. 390, 88 S. Ct. 2084, *reh. denied,* 393 U.S. 902, 89 S. Ct. 65 (1968); *Teleprompter Corp.* v. *Columbia Broadcasting Sys., Inc.,* 415 U.S. 394, 94 S. Ct. 1129 (1974).

Congress over the ensuing years worked out a legislative compromise, one part of which was the provision in the Act of a definition of "to perform or display a work publicly" having a breadth sufficient to encompass the distribution of relayed signals by CATV systems. Recognizing that a process requiring each CATV system to obtain the consent of or negotiate with

numerous individual copyright owners would be unworkable, *See, Malrite T.V. of New York,* v. *Federal Communications Commission,* 652 F.2d 1140, 1148 (2d Cir. 1981), *cert. denied, sub nom, National Football League* v. *Federal Communications Commission,* 102 S. Ct. 1002 (1982), Congress established as the other part of the compromise the compulsory license program set forth in the Act.[7]

Under the congressionally mandated scheme, television broadcast stations like WOR-TV continue to pay license or royalty fees directly to copyright owners like Doubleday, while CATV systems pay license fees under their compulsory licenses to the United States Copyright Office in accord with formulae provided in 17 U.S.C. § 111(d)(2)(B).[8] The fees paid by

[7] 17 U.S.C. § 111(c)(1) provides:

Subject to the provisions of clauses (2), (3) and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmissions is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

[8] 17 U.S.C. §111(d)(2)(B) provides in part:

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period from the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

> (i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter . . .
>
> (ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;
>
> (iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;
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> (iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; . . .

CATV systems are distributed to copyright owners like Doubleday by the Copyright Royalty Tribunal (Tribunal), as provided for in 17 U.S.C. § 111(d)(5).[9] The Congressional scheme thus provided for compensation from CATV systems to copyright owners measured by the number of cable viewers or potential viewers, and placed the responsibility for payment of that compensation on the CATV systems.

Exemption

We begin, as we must, with the statute, 17 U.S.C. § 111(a)(3), supra, note 3, under which EMI is entitled to the "carrier"[10] exemption if its activities are passive, merely retransmitting exactly what it receives, if it exercises no control over the content or selection of the primary transmission, or over the particular recipients of its transmission, and if its retransmission activities consist solely of providing wires, cables, or other communications channels for the use of others.[11]

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[9] 17 U.S.C. § 111(d)(5) reads:

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmission shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation.

[10] Though Doubleday insists on comparing EMI with the telephone company, the statute speaks in terms of "any carrier", 17 U.S.C. § 111(a)(3), supra note 3, and EMI is licensed by the FCC as a common carrier, infra, note 14.

[11] As reflected in the text, we believe a proper application of the statute, and continuation of its overall scheme as designed by Congress, requires that EMI's activities challenged in this case be perceived as falling within the intent of 17 U.S.C. § 111(a)(3). Later pronouncements of the Congress cannot be looked to as indicative of its intent at the time of a statute's

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The first question presented is thus whether EMI exercised "control over selection of the primary transmission" when it chose to retransmit the WOR-TV signal via satellite. Via its terrestrial microwave repeaters, EMI retransmits the broadcast signals of WOR-TV, WNEW, WPIX, WCBS-TV, WSBK, WSTM, WPHL, WIXT, WUAB, CHCH, CKWS, WQXR-FM, Home Box Office, Prism, and programming of the Pennsylvania Educational Television Network. With respect to its extra-terrestrial activity, only one satellite transponder was made available to EMI, enabling satellite retransmission of only one broadcaster's signals.

With satellite transmission of but one broadcaster's signals available, EMI naturally sought to retransmit those of a

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enactment. Of general interest, however, is a recent House Committee Report on H.R. 5949, 97th Cong., 2nd Sess. (May 17, 1982), and its comment on this very case:

> In the course of Committee deliberations on this legislation, a decision was issued in a case involving an interpretation of Section 111(a)(3), *Eastern Microwave, Inc.* v. *Doubleday Sports, Inc.*, 81-CV-303 (N.D., N.Y., March 12, 1982), which leaves the cable industry in a state of turmoil. The holding of that case was that the carrier, Eastern Microwave, Inc., failed to qualify for the Section 111(a)(3) exemption. In the Committee's view, the decision incorrectly construed the carrier exemption. If the decision is applied to other parties, all satellite resale carriers could be held liable for copyright infringement when they deliver distant signals to cable systems. Further, terrestrial microwave carriers could also be in danger of losing their exemption. These carriers are the primary means whereby cable systems receive distant signals for retransmission to cable subscribers; rather than face copyright liability, they may suspend broadcast retransmission. As a result, the signal carriage standards of the FCC could be undone, and the entire compulsory licensing scheme undercut, which would be antiethical [sic] to the intent of this committee and the public interest.
>
> There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities. H.R. REP. No. 559, 97th Cong., 2d Sess. 4 (1982).

marketable station. If EMI's CATV satellite customers had preferred the signals of WNEW, for example, over those of WOR-TV, EMI would presumably have chosen the former over the latter. Based on demand shown by numerous CATV systems surveyed and solicited, the marketable station sought proved to be WOR-TV. In meeting that demand by supplying the WOR-TV signal, EMI does so passively, retransmitting exactly what it receives and the entirety of what it receives. That one-time determination by EMI to retransmit WOR-TV's signals reflects EMI's limitation to one technical facility and the realization that once contracts are entered, EMI cannot retransmit any other signals on that facility.

Technical restrictions which forced EMI to make an initial, one-time determination to retransmit the signals of a particular station, whatever the content of those signals, do not evidence the "control over the content and selection of the primary transmission" intended to be precluded under Section 111(a)(3). In the ordinary common carrier context, the carrier must render its service to all comers, denying it to none on the basis of content, and must not select or choose among those who seek to use its service, on any basis other than a legitimate business reason. When the communication service is technologically limited to one sender, however, a type of "selection" is impelled. That type of forced selection cannot be the type precluded by the statute in the context here presented, for to so hold would be to require that exemption be denied to any carrier that did not retransmit every television broadcast of every television station in the country. Moreover, if station selection were the type of "selection" precluded, a failure to retransmit the signals of one station could be viewed as a control of content forbidden to carriers by the Act.[12] To hold

[12] Moreover, the futility of embuing technological limitations with copyright significance is illustrated by a consideration that if selection of one station when only one is technically possible precludes exemption, a selection of two, or three, or thirteen, or whatever number (less than the total) was technologically possible, would also preclude exemption.

that "selection" means station selection would thus emasculate the exemption provision of the Act with respect to intermediate carriers, in derogation of the duty of upholding statutory provisions not contrary to reason, logic, common sense or the Constitution.

To remain exempt, a carrier-retransmitter must avoid content control by retransmitting exactly what and all of what it receives, as EMI does here. To do otherwise could be perceived as the carrier's making the transmission its own. That EMI serves customers at one end of the communications chain, and telephone companies serve customers at the other, is not controlling, so long as neither injects its own communications into that chain. If WOR-TV had requested and paid EMI to transmit its broadcast signal, for example, the traditional common carrier context would have been created. That EMI serves numerous receiving CATV systems, with the one available set of signals those customers prefer, rather than serving numerous sending broadcasters, is a difference insufficient to deny EMI the statutory carrier exemption on the ground that it is controlling the content or selection of that set of signals.

The second requirement, an absence of direct or indirect control over the particular recipients of its retransmission, is fully satisfied by EMI. It is undisputed that the "particular recipients"[13] of EMI's retransmissions are the many CATV systems which it serves under contract. That it renders its service to certain CATV systems and not others does not itself constitute, however, any control, direct or indirect, over particular recipients. As above indicated, the so-called "resale carriers" are somewhat new in the common carrier world, in that they serve the receiver rather than the sender of a commu-

[13] Because Congress was focusing on CATV systems which had been themselves acquiring broadcast signals and making a "secondary transmission" thereof to their subscribers, it may arguably have intended that "particular recipients" be read as the viewers-subscribers of the CATV system. If so, EMI's activities are even more divorced from control of those recipients.

nication. EMI is subject to FCC regulation and has been granted authority under 47 U.S.C. § 214 to operate as a common carrier.[14] As such, it is bound to furnish its communications services upon reasonable requests. 47 U.S.C. § 201(a). That EMI operates under FCC-approved tariffs which a particular CATV system might not be able to meet does not mean that EMI exercises control over its recipient CATV customers. The record indicates that no reasonable request for its services was ever refused by EMI. EMI has thus not exercised "control over the particular recipients" of its transmissions within the meaning and intent of 17 U.S.C. § 111(a)(3).

EMI also meets the third requirement, that it merely provide wires, cables, or other communications channels for the use of others. As above indicated, the "others" here are the receiving CATV systems which cannot afford their own wires, cables, and channels, rather than the originating senders who use (and cannot afford their own) wires, cables, and channels of more traditional common carriers like a telephone company. EMI provides the wires and cables of its repeater stations for use of its CATV customers in acquiring the signals of WOR-TV and those of many other originators. It provides its single satellite transponder for use of its CATV customers in acquiring the signals of necessarily one originator, i.e., WOR-TV.

Doubleday argues in effect that EMI provides wires, etc., for its own use because it is "selling" the Mets games.[15] EMI is selling, however, only its transmission services, CATV systems paying therefore on the basis of number of subscribers only up

[14] EMI has been licensed by the FCC to provide point-to-multipoint distribution of the WOR-TV signal via its terrestrial relay facilities and the transponder leased from RCA. *In re Applications of Eastern Microwave, Inc.*, 70 F.C.C.2d 2195 (1979).

[15] Doubleday complains bitterly of EMI's promotional and marketing efforts. Engaging in those normal business activities does not, however, constitute doing "more than" providing wires, etc. Compliance with the third requirement is met if a carrier does no more than provide wires, etc., "with respect to the secondary transmission." 17 U.S.C. § 111(a)(3).

to a maximum compensation of $3,000, regardless of the content of the retransmitted signals. When the maximum is reached, the payment remains the same, regardless of the number of subscribers. EMI transmits nothing of its own creation. It transmits only to the headends of its customers who employ its services in lieu of obtaining their own wires, cables, etc., infra, note 17. That it transmits particular signals in response to contracts with its customers specifying those signals, and that it announces to potential customers its ability to transmit those signals, are actions not in conflict with an exempt carrier status. EMI's activities with respect to its transmissions thus consist of nothing more than providing wires, cables, and other communication channels for use of others within the meaning and intent of 17 U.S.C. § 111(a)(3).[16]

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[16] Our attention has been invited to *WGN Continental Broadcasting Company and Albuquerque Cable Television, Inc.* v. *United Video, Inc.*, No. 81-2687 (7th Cir. Aug. 11, 1982). There, United Video retransmitted WGN's signal to cable systems, a service similar to EMI's. Unlike EMI's, however, United Video actively removed material inserted by WGN into the "vertical blanking interval" and substituted business news. *Id.* at 2.

In *WGN*, the court recognized, as do we, that passive intermediaries like EMI are entitled to the exemption:

> The exemption thus allows carriers such as United Video to act as purely passive intermediaries between broadcasters and the cable systems that carry the broadcast signals into the home, without incurring any copyright liability. The cable system selects the signals it wants to retransmit, pays the copyright owners for the right to retransmit their programs, and pays the intermediate carrier a fee for getting the signal from the broadcast station to the cable system. The intermediate carrier pays the copyright owners nothing provided it really is passive, like a telephone company. *Id.* at 3.

Because United Video was not passive, it was held non-exempt. As indicated, supra, note 5, we do not here discuss the question of whether an intermediate resale transmitter publicly displays or performs when it transmits. Similarly, we do not comment on the remarks touching that question in *WGN* or on the effect, if any, on that question of United Video's injecting its "own" programming. There is an indication, in *WGN* and in the briefs here,

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The Compulsory License Scheme

Interpretation of the Act must occur in the real world of telecommunications, not in a vacuum. The centerpiece of the compromise reflected in the Act is the compulsory licensing scheme. That scheme is predicated on and presupposes a continuing ability of CATV systems to receive signals for distribution to their subscribers. Doubleday is but one of numerous copyright owners whose works may be broadcast by WOR-TV. EMI serves as a signals conduit between the performance by WOR-TV and the performance by its CATV system customers. Adoption of Doubleday's position would stand all copyright owners athwart that conduit between the original broadcast and the opportunity for subsequent performances by CATV systems. In so doing, it would defeat Congress' intent by imposing on EMI the unworkable separate negotiations with numerous copyright holders from which the Act sought to free CATV systems.

Congress drew a careful balance between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to

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that an interpretation limiting "public performance" to transmissions capable of reception by the public would necessarily render the "carrier" exemption superfluous. When the 1965 version of the bill eliminated "common carrier," the late Professor Derenberg wrote the House Judiciary Committee, fearing that a CATV system that leased AT&T equipment to distribute signals directly to the public would render AT&T liable for infringement. The exemption was reinstated. Thus common carriers whose equipment is used to distribute signals to CATV subscribers have a continuing need for the exemption to avoid liability for communicating "to the public" as expressed in the pertinent portion of 17 U.S.C. § 101:

> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers. The public interest thus lies in a continuing supply of varied programming to viewers. Because CATV systems served by intermediate carriers cannot provide their full current programming to their subscribers without the services of those carriers,[17] imposition of individual copyright owner negotiations on intermediate carriers would strangle CATV systems by choking off their life line to their supply of programs, would effectively restore the "freeze" on cable growth described above, and, most importantly, would frustrate the congressional intent reflected in the Act by denying CATV systems the opportunity to participate in the compulsory licensing program. After years of consideration and debate, Congress could not have intended that its work be so easily undone by the interposition of copyright owners to block exercise of the licensing program by cable systems.[18]

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[17] EMI retransmits WOR-TV's signals to six hundred CATV systems which cannot provide retransmission for themselves because satellite transponders are unavailable and because the capital costs of repeater stations are prohibitive.

[18] It is asserted that various groups are at best disenchanted with the compulsory license scheme. If so, their remedy lies with the Congress, not the courts. *See* Remarks of Bowie Kuhn, Commissioner of Baseball, June 2, 1982: "We have always taken the position that the compulsory license should be repealed and replaced by a marketplace solution. We continue to believe strongly that complete repeal of the compulsory license is the proper course." Hearings Before the Subcommittee of Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. 46-47 (1982). *See also* Speech by Mark S. Fowler, FCC Chairman, to Association of Independent Television Stations Inc. (Jan. 26, 1982); Hearings before the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 124-25 (1981) (Testimony of David Ladd); Letter of Asst. Atty. Gen. Robert A. McConnell, Justice Dept. Office of Legislative Affairs, to Chairman Rodino, House Judiciary Comm. (Mar. 20, 1982); U. S. Dept of Commerce, National Telecommunications and Information Admin., *Cable Copyright, Alternatives to the Compulsory License* (Dec. 1981); Hearings Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Judiciary Comm., 97th Cong., 1st Sess. 51 (Prepared Statement of Clarence James, former Chairman of the Copyright Royalty Tribunal at 67) (Mar. 4, 1981).

The Royalty Scheme

EMI is, like all common carriers, compensated for its transmission services as such. In accord with its FCC-approved tariff, and as above indicated, EMI is paid by each CATV system in relation to the number of its subscribers up to a maximum of $3,000. The fee does not increase thereafter, regardless of the number of a CATV system's subscribers. In contrast, the royalty fee paid by each CATV system under the Act is limited to no maximum, but is entirely based on percentages of gross receipts from subscribers to the CATV service in accord with 17 U. S. C. § 111, supra, note 8.

It is undisputed that if each CATV system had its own string of microwave repeaters or satellite transponder it would be liable through the Tribunal to a copyright owner for only the one established royalty fee when and if it publicly performed the copyrighted work by making it available to its subscribers; and that such an integrated CATV system would not be liable for a second royalty fee for having itself retransmitted the original broadcast signal to its headend. We are unpersuaded by counsel's urging that a different result should obtain when a separate entity, e.g. EMI, supplies the retransmission service. That EMI is a separate entity supplies no justification for subjecting EMI to copyright liability when those same activities would not result in copyright liability if carried out by the CATV systems served by EMI. In the Act, Congress established a specific scheme for recognition of the rights of copyright owners. Under that scheme those rights are not unlimited. Neither are they rendered superior to the rights of viewers. If this court were to impose here a requirement that intermediate carriers negotiate with and pay all copyright owners for the right to retransmit their works, assuming such requirement were not impossible to meet, such action would produce a result never intended by Congress, namely a substantially increased royalty payment to copyright owners with no increase in number of viewers.[19]

[19] EMI asserts that a royalty payment to Doubleday alone would amount to millions. Moreover, under the district court's rationale for denying

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Conclusion

In summary, given the nature of EMI's services here involved, and the role those services play in the overall chain of signals distribution, we conclude that EMI is not in law infringing Doubleday's exclusive right to display its copyrighted work by passively retransmitting the entirety of WOR-TV's broadcast signal to the headends of its customer CATV systems, because those services are such as to fall within the exemption provided for in 17 U.S.C. § 111(a)(3). Reversal of the judgment appealed from is accordingly required.

REVERSED

(Footnote continued from preceding page)

exemption, RCA's retention of its transponder and retransmittal of the WOR-TV signal received from EMI, would require payment of four royalties to Doubleday and all other owners of copyrighted works broadcast by WOR-TV (one each from WOR-TV, EMI, RCA and the CATV systems) though the number of ultimate viewers would remain unchanged from the present number justifying payment of two royalties.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

81-CV-303

EASTERN MICROWAVE, INC.,
Plaintiff,

-v-

DOUBLEDAY SPORTS, INC.,
Defendant.

APPEARANCES:

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ROBERT N. WEINER, ESQ.

Memorandum-Decision and Order

This matter is before the Court on the parties' cross motions for partial summary judgment. The issues to be decided are: (1) whether Eastern Microwave's retransmissions of WOR-TV telecasts, more particularly WOR's broadcasts of the METS' games, are public performances within the meaning of 17 U.S.C. § 106; and (2) whether Eastern Microwave is exempt from copyright liability for those retransmissions, if they are found to be public performances, by virtue of the exception set out in 17 U.S.C. § 111(a)(3). For the reasons set forth below, plaintiff's motion for partial summary judgment is denied; defendant's motion for partial summary judgment is granted.

Background

Plaintiff Eastern Microwave, Inc. [EMI], a Syracuse based corporation, is licensed by the Federal Communications Committee [FCC] to act as a communications common carrier. *See* 47 U.S.C. § 214.[1] At least part of the business conducted by EMI is the retransmission of television signals via microwave and satellite transmission to Community Antennae Television [CATV], or cable systems in the Northeast and across the country. EMI retransmits approximately 16 different television signals. The controversy in this case centers on the retransmission of one of those signals, WOR-TV, broadcast from New York City.

Plaintiff has been retransmitting the WOR signal, either by microwave relay or by satellite, or both, since 1965. To this date, WOR has not objected to EMI's transmission of its signal.

[1] The definition of common carrier is set forth in 47 U.S.C. § 153 as follows: " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio. . . ."

One of the copyright owners of a program broadcast by EMI has, however, objected to the retransmission of its copyrighted work, the defendant Doubleday Sports, Inc.[2]

Defendant Doubleday is the owner of the New York Mets, a National League baseball team. Each year Doubleday contracts with EMI for the broadcast of approximately 100 Mets' games per season.[3] At the beginning and conclusion of each game broadcast, the following disclaimer is read by the broadcaster:

> This copyrighted telecast is authorized under television rights granted by the New York Mets solely for the entertainment of our audience. Any publication, reproduction or use of the pictures, descriptions and accounts of this game without the express written consent of the New York Mets is prohibited. Any commercial or other use of the program, such as by charging admission for its showing, is similarly prohibited.[4]

EMI has never requested, nor has Doubleday ever granted to EMI, permission to retransmit the Mets' games to its CATV customers. It is this retransmission without consent that Doubleday alleges infringes its rights under the Copyright Act, 17 U.S.C. §§ 101-702.

Doubleday first informed EMI of its objection to EMI's retransmission of the Mets' games on March 27, 1981. By letter, Doubleday gave notice to EMI that Doubleday viewed any retransmission by EMI of the Mets' games scheduled for

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[2] EMI argues that, under common law notions, Doubleday may not be the owner of the copyright in the games broadcast by WOR-TV. The Court need not decide this issue, however, as there exists a contract between WOR-TV and Doubleday reserving the copyright interest in the games broadcast to Doubleday Sports, Inc.

[3] Doubleday has contracted with other entities to broadcast METS' games, other than those telecast by WOR.

[4] This disclaimer is read in the past tense at the conclusion of the game.

broadcast in the month of April to be an infringement of Doubleday's copyright interest in those broadcasts.[5] Doubleday also sent a telegram to EMI restating the same message. The following month, Doubleday once again sent a letter and confirming telegram stating its objection to any retransmission by EMI of the Mets' games. This letter and telegram set forth the games to be telecast by WOR-TV in the month of May. EMI, however, continues to retransmit the WOR-TV signal without deleting the Mets' games. On April 3, 1981, EMI filed suit in this Court seeking a judicial declaration that its retransmissions of the Mets' games do not infringe on any copyright interest held by defendant. Doubleday subsequently brought this motion for partial summary judgment declaring, pursuant to Rules 56 and 57 of the Fed. R. Civ. P., plaintiff's retransmissions not exempt from infringement by virtue of the exceptions to the Copyright Act contained in § 111(a)(3) and dismissing plaintiff's complaint for declaratory judgment in accordance therewith. EMI thereafter crossed moved for partial summary judgment seeking denial of plaintiff's motion and affirmative judgment for defendant.

EMI orginally alleged that it was exempt from copyright liability because its retransmissions were within the exception set out in 17 U.S.C. 111(a)(3) for carriers. EMI later amended its complaint to set forth its further contention that it was not liable for copyright infringement because it does not perform the retransmissions publicly, as required by 17 U.S.C. § 106. It is the opinion of the Court that neither of these arguments is availing.

Discussion

Public Performance

Pursuant to the Copyright Act, the owner of a copyrighted work has the exclusive right to perform that work publicly. 17

[5] There is no dispute in this case that these games, if "fixed" i.e., recorded simultaneously, are copyrightable.

U.S.C. § 106. Therefore, in order for this Court to find that EMI is infringing Doubleday's copyright in the Mets' games broadcast over WOR-TV, it must first be determined that EMI's retransmission of the games to its CATV customers constitutes a public performance.

The definition of a public performance is set forth in 17 U.S.C. § 101, which states in pertinent part:

> To perform or display a work "publicly" means—
>
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Here, the parties do not dispute the EMI "performs" the WOR broadcasts of the Mets' games;[6] the question is whether it does so publicly.

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[6] EMI retransmits the WOR signal by two methods, microwave point to point relay and by satellite.

As described in plaintiff's memorandum of law, a microwave relay system consists of a series of terrestrial microwave radio stations using towers or other high structures. The structures are located on high mountain peaks or other unobstructed sites which permit line-of-sight interference-free signal transmission to each other, on frequencies allocated and licensed by the F.C.C. Using a string of microwave stations, television signals, once converted to microwave signals, are relayed over long distances. Ultimately, the microwave signal is transmitted to the CATV receiving antenna or headend, where it is fed into electronic signal processing equipment by the CATV operator. The Frequency is then reconverted to a television frequency and delivered to the CATV subscribers. Pl. Mem. at 7.

(Footnote continued on following page)

The recipients of EMI's retransmissions of the WOR telecasts are approximately 600 CATV systems across the country, and two hotels located in Las Vegas, Nevada.[7] As described in more detail in n. 6, the CATV systems receive the EMI retransmission at a headend, or receiving antenna. The headends are not places open to the public. These retransmissions, therefore, are not to the public within the meaning set forth in clause one of section 101. It appears to this Court, however, that these retransmissions are public within the meaning of clause two of that section, that is, EMI "transmit[s] or otherwise communicate[s] a performance ... *to the public*...." 17 U.S.C. § 101 (emphasis added).

It is EMI's position that "public" as used in this portion of section 101 refers solely to members of the viewing public. Therefore, it contends that its transmissions to CATV systems are not transmission to the public because the CATV systems do not view the programs transmitted, they merely alter the signal received and transmit it to their subscribing members. It is the subscribing members that EMI asks this Court to view as

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(Footnote continued from preceding page)

Satellite retransmission allows the carrier to carry the transmission to farther distances more economically. Again, as described by plaintiff in its memorandum, EMI transmits the WOR signal via satellite by first picking up the WOR signal "off the air" at its antenna in Highland Lakes New Jersey. EMI then transmits the signal to the satellite's earth station transmitting site in Vernon Valley, New Jersey. Here, the signal of WOR is transmitted to the satellite by use of an "up-link" or ten meter parabolic dish. The signal is then relayed to Earth and is collected at an earth receive station, or "down-link", owned by EMI's CATV customers. The CATV operator then reconverts and delivers the signal in the same manner as when the signal is relayed by microwave. Pl. Mem. at 9-10.

[7] The parties, in their arguments to the Court have, interestingly enough, not focused on the differences between a CATV system and the hotels, as relates to the public performance requirement and the availability of the exception in § 111(a)(3). However, because it is the opinion of this Court that EMI's retransmissions to the CATV systems are not excepted from liability under § 111(a)(3) and that these are public performances, the rationale of this opinion, although not directed to the hotels, is intended to include the transmissions to the hotels.

the "public", thereby making EMI's transmissions non-public performances. This Court does not agree.

There is no evidence that in drafting this definition, Congress intended the word "public" to be construed so narrowly. *See, e.g.*, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64-65, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 5659, 5679-5680.[8] Had Congress intended the "public" to be limited to members of the viewing public, it could easily have limited the definition. Such is not the case. In the absence of such intention on the part of Congress, this Court is not willing to narrow this definition. EMI's CATV customers are themselves members of the public.[9] The retransmissions of the MET's games by EMI are, therefore, public performances.

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[8] In commenting upon this exception, the Senate Committee stated in its report that:

> Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 64-65, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 5659, 5679-5680.

[9] It is not disputed that the CATV systems are customers of EMI. EMI's Domestic Resale Satellite Communications Services Tariff, F.C.C. No. 11 at page 6 states that "Customer is *any member of the public* who directly orders or orders and receives communications services offered or provided by Carrier [EMI]." (Emphasis added). Further, EMI's CATV Service Agreement states that "WHEREAS EASTERN MICROWAVE, INC. is a common carrier licensed by the Federal Communications Commission to engage in *furnishing to the public*, video and audio program transmission service. . . ." (Emphasis added).

The parties have cited, and the Court has found, only one published opinion involving the meaning of "public" within 17 U.S.C. §§ 106, 101 *WGN Continental Broadcasting Co.* v. *United Video, Inc.*, 523 F. Supp. 403 (N.D. Ill.) (appeal docketed Oct. 26, 1981, 81-2687). In that case, Judge Getzendanner held that satellite retransmissions to CATV system "headends" were not performances to the public within the meaning of 17 U.S.C. §§ 101, 106. There the Court stated that:

> [i]t is true that without UVI [the carrier] these cable systems would not be able to transmit WGN's programming to the public, but UVI is only an intermediary in the distribution chain. The retail distributors, the cable television systems, pay royalties because they distribute to the public. If the wholesaler, UVI, was also liable for copyright infringement, it would also be liable for royalties. That would result in a double payment but the number of ultimate viewers would remain the same.

Id. at 415. The Court further stated that an interpretation of the term "public" which would include the CATV systems, would, in effect, read the public requirement out of the Act. *Id.* This Court does not agree. Rather, to limit the meaning of public to the viewing public without express direction from Congress would be to read a narrow interpretation of public *into* the Act. Therefore, it is the determination of this Court that EMI does publicly perform the copyrighted works of Doubleday Sports, within the meaning of 17 U.S.C. §§ 101, 106.

Exception

Not all public performances of copyrighted works constitute copyright infringement. The Act contains certain limitations on the exclusive right to public performance. The

limitation relevant here is found in 17 U.S.C. § 111(a)(3), which provides that:

> [t]he secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of a copyright if—
>
> (3) The secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cable, or other communications channels for the use of others. . . .

Id.[10] In this case, the primary transmission is the signal broadcast by WOR-TV; the secondary transmission is the retransmission of the WOR signal by EMI to its CATV customers. EMI argues that it has no control over the content or selection of the primary transmission or over the recipients of the secondary transmission and that its activity is limited to providing wires, etc. Doubleday contends that EMI does not

[10] Primary and Secondary transmissions are defined in 17 U.S.C. § 111(f) as follows:

> A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.
>
> A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico: Provided, however, That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

come under this exception. This Court finds the position of Doubleday more convincing.

The first requirement for this exception to be effective is that the carrier have no control over the content or selection of the primary transmission, in this case the signal of WOR-TV. Based on the record before the Court, it appears that EMI does not exercise control over the content of WOR-TV programming. It does, however, exercise control over the selection of the primary transmission.

It was EMI that selected WOR's signal to be retransmitted to the public. The decision to retransmit WOR by satellite relay was made after EMI had conducted a survey to determine the marketability of the WOR signal. Originally, EMI had planned to transmit two television signals via satellite, WOR and WSBK, broadcast from Boston. EMI was only able to contract for one channel over the satellite, therefore, it had to select between the two already selected for the one signal to be retransmitted. Based on the demand for WOR-TV demonstrated by EMI's survey, EMI selected the WOR signal. It is clear that EMI selected the primary transmission.

EMI argues that this Court should hold that no selection has been made by EMI because the sole reason EMI selected WOR's signal is EMI's inability to retransmit every television signal broadcast in the country. EMI urges that the technical impossibility of transmitting every tv signal forced EMI to choose one signal. Therefore, it was necessity, or technical impossibility, that selected the WOR signal. This Court finds this argument to be without merit.

EMI also exercises control over the recipients of the secondary transmission, the CATV systems. It is EMI who chooses the customers with which it will deal. EMI contends that the subscribing members of the CATV systems, the viewing public, are the recipients of the secondary transmission

and that EMI has no control over these recipients.[11] EMI only carries the secondary transmission to the CATV headends, however. The signal received by the subscribing members is transmitted by the CATV systems themselves. Therefore, the recipients of the secondary transmission carried by EMI are the CATV systems, not their subscribing members.[12]

Assuming, arguendo, that EMI did not exercise control over the selection of the primary transmission or the recipients of that transmission, this exception would still not be available to EMI for its activity is not limited to providing wires, cables, or other communications channels, for the use of others, as required by section 111(a)(3).[13]

It is true that EMI makes its service available by providing these avenues of communication. It does not, however, provide them solely for the use of others. Rather, they are used to make available the product it is marketing, WOR-TV.

In its brief, EMI likens itself to carriers such as AT&T, who do provide wires, etc., for the use of others. EMI contends that as the activities of AT&T would, in many cases, come under the exception contained in section 111(a)(3), so should this activity of EMI.[14] In connection with this contention, EMI has filed

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[11] It appears from at least one of the documents filed in this case that EMI might control some of the recipients of the signal as delivered by the CATV systems. EMI's Customer Service Order provides that "The cable system will not have the right to extend the service to other customers without Eastern's permission. Eastern shall grant such permission at tariff rates."

[12] As described, *supra* at n. 6, the signal received by the subscribing members is not the same signal retransmitted by EMI. The CATV operator must reconvert EMI's signal into a frequency which can be received by the subscribing member.

[13] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 92, *reprinted in* [1976] U.S. Code Cong. & Ad. News, 5706, states that for this exception to be available, the carrier must be "passive".

[14] It would appear from the ⅛⅜!
was impliedly, if not specificly, designed to provide exemption to carriers such as AT&T. Pl. Mem. at 40-50; Def. Memo. at 45-55.

with the Court numerous examples of AT&T advertising campaigns, the similarity of which to EMI advertisements it urges places EMI in *pari causa* with AT&T. There is, however, at least one major difference between AT&T and EMI. AT&T markets its services; EMI markets a product.

The advertisements demonstrate that EMI is doing more than providing cables, etc., for the use of others. It is selling a product, the signal of WOR-TV. While AT&T makes its services available to anyone desiring to transmit a communication from one point to another, EMI only offers the communication it is marketing. EMI, therefore, is using the facilities it makes available for its own marketing, not for use by others. It is not the fact that EMI advertises that causes EMI to lose the exemption set forth in this section. It is the fact that the advertisements demonstrate that EMI is, itself, using the wires, etc., it makes available, in contravention of the requirement set forth in 17 U.S.C. § 111(a)(3).

The Court having determined that EMI performs the copyrighted works of the defendant publicly, and that the exemption contained in 17 U.S.C. § 111(a)(3) is not available to EMI, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's motion for partial summary judgment declaring plaintiff's transmissions exempt from infringement is denied and defendant's motion for partial summary judgment dismissing the complaint is granted.

IT IS SO ORDERED.

Neal P. McCurn
U. S. District Judge

DATED: March 12, 1982
Syracuse, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

81-CV-303

EASTERN MICROWAVE, INC.,
Plaintiff,

v.

DOUBLEDAY SPORTS, INC.,
Defendant.

APPEARANCES:

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VICKI J. DIVOLL, ESQ.

ORDER OF AMENDMENT

It be and hereby is ORDERED, that the Court's Memorandum-Decision and Order dated and filed March 12, 1982, be amended to add the following after the last paragraph on page 9:

"Further, it appears that there is no just reason for delaying the entry of judgment dismissing EMI's amended complaint. EMI instituted the action by requesting a declaratory judgment based on the issues that have now been decided by this Court. Although Doubleday after institution of the action raised counterclaims, the parties and the Court have treated the complaint and the counterclaims as raising separate and independent issues.

Immediately after the filing of the complaint, the parties, appearing before the Court, agreed to an expedited discovery schedule and agreed to cross-move for summary judgment, as soon as possible, on the issues raised by EMI's complaint. It was decided that by separating the issues in the complaint from those raised in the counterclaims, protracted discovery and an unduly long hearing could be avoided while the rights of the parties with respect to the issues posed in the complaint could be determined in an expeditious manner. The Court limited discovery to those issues framed by the complaint.

From the beginning of this action, the parties and Court have treated the issues raised by the complaint and by the counterclaims as totally separate and distinct. The Court's determinations which are embodied in this Order are not susceptible to revision by this Court nor will they be affected by this Court's determination of the remaining issues. Additionally, an immediate appeal on the issues decided by this Court could eliminate further litigation. Therefore, it is hereby

ORDERED and expressly directed, in accordance with Rule 54 (b) of the Federal Rules of Civil Procedure, that final judgment be entered dismissing the amended complaint."

IT IS SO ORDERED.

Neal P. McCurn
U. S. District Judge

DATED: April 24, 1982
Syracuse, New York

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE No. 81-CV-303

EASTERN MICROWAVE, INC.,
Plaintiff,

vs. JUDGMENT

DOUBLEDAY SPORTS, INC.,
Defendant.

This action came on for (hearing) before the Court, Honorable Neal P. McCurn, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the amended complaint is dismissed.

I certify that this is a true copy
Attest 4/26/82

_____
Clerk, U.S. District Court

By _____
Deputy

Dated at Utica, N.Y., this 26th day of April, 1982.

.....
Clerk of Court

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED COPY
Apr. 26, 1982
AT O'CLOCK M.
J. R. SCULLY, Clerk
UTICA

United States Court of Appeals

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October one thousand nine hundred and eighty-two

Present:

HON. ELLSWORTH A. VAN GRAAFEILAND,

HON. LAWRENCE W. PIERCE,
Circuit Judges

HON. HOWARD T. MARKEY,
Ch.J. U.S. Court of Customs & Patent Appeals

No. 82-7243

EASTERN MICROWAVE, INC.,
Plaintiff-Appellant,

v.

DOUBLEDAY SPORTS, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York

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This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court with costs to be taxed against the appellee.

A. Daniel Fusaro, Clerk

/s/EDWARD J. GUARDARO

by Edward J. Guardaro,
Deputy Clerk

RELEVANT STATUTORY PROVISIONS

Section 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

* * * * *

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

* * * * *

Section 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures

and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

* * * * *

Section 111. Limitations on exclusive rights: Secondary transmissions

(a) Certain secondary transmissions exempted

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if—

* * * * *

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others: *Provided,* That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions . . . .

* * * * *

(c) Secondary transmissions by cable systems

(1) Subject to the provisions of clauses (2), (3) and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast

station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, in the following cases:

(A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or

(B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (e) of this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections

509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research: *Provided,* That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmission: *And provided further,* That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial time.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules, regulations, or authorizations of the Federal Communications Commission.

(d) Compulsory license for secondary transmissions by cable systems

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

(A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast

transmitters, and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraphs (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable

costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation.

Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

* * * * *

(f) Definitions

As used in this section, the following terms and their variant forms mean the following:

A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary

transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico; *Provided, however,* That a nonsimultaneous further transmission by a cable system located in Hawaii of a primary transmission shall be deemed to be a secondary transmission if the carriage of the television broadcast signal comprising such further transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(2), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

Section 501. Infringement of Copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright.

* * * * *

EXHIBIT 11

a WORLD of difference!™

1981 NEW YORK METS BASEBALL

WOR-TV Televised Games

EXH - EXHIBITION TWI-TWI NIGHT DH - DOUBLEHEADER

EXHIBITION SCHEDULE

					NYCT
MARCH					
Mon.	23	Mets	Los Angeles	at St. Petersburg	7:30 PM
APRIL					
Thurs.	2	Mets	Cincinnati	at St. Petersburg	7:30 PM
Sun.	5	Mets	Atlanta	at St. Petersburg	1:30 PM

REGULAR SEASON SCHEDULE

Thurs.	9	Mets	Chicago	Away	2:30 PM
Sat.	11	Mets	Chicago	Away	2:15 PM
Sun.	12	Mets	Chicago	Away	2:15 PM
Tues.	14	Mets	St. Louis	Home (Open Day)	2:00 PM
Sat.	18	Mets	Montreal	Home	2:00 PM
Sun.	19	Mets	Montreal (DH)	Home	1:00 PM

APRIL					NYCT
Wed.	22	Mets	Pittsburgh	Away	7:30 PM
Sat.	25	Mets	Montreal	Away	1:30 PM
Sun.	26	Mets	Montreal	Away	1:30 PM
Wed.	29	Mets	Pittsburgh	Home	8:00 PM
MAY					
Sat.	2	Mets	San Diego	Home	2:00 PM
Sun.	3	Mets	San Diego (DH)	Home	1:00 PM
Wed.	6	Mets	San Francisco	Home	8:00 PM
Fri.	8	Mets	Los Angeles	Home	8:00 PM
Sat.	9	Mets	Los Angeles	Home	2:00 PM
Sun.	10	Mets	Los Angeles	Home	2:00 PM
Wed.	13	Mets	San Diego	Away	10:00 PM
Sat.	16	Mets	Los Angeles	Away	10:00 PM
Sun.	17	Mets	Los Angeles	Away	4:00 PM
Tues.	19	Mets	San Francisco	Away	10:30 PM
Fri.	22	Mets	St. Louis	Away	8:30 PM
Sun.	24	Mets	St. Louis	Away	2:15 PM
Mon.	25	Mets	Philadelphia	Home	2:00 PM
Wed.	27	Mets	Philadelphia	Home	8:00 PM
Fri.	29	Mets	Chicago	Home	8:00 PM
Sat.	30	Mets	Chicago	Home	2:00 PM
Sun.	31	Mets	Chicago	Home	2:00 PM
JUNE					
Wed.	3	Mets	Philadelphia	Away	7:30 PM
Fri.	5	Mets	Houston	Away	8:30 PM
Sat.	6	Mets	Houston	Away	8:30 PM
Tues.	9	Mets	Cincinnati	Home	8:00 PM
Thurs.	11	Mets	Cincinnati	Home	8:00 PM
Fri.	12	Mets	Houston	Home	8:00 PM
Sat.	13	Mets	Houston	Home	7:00 PM
Sun.	14	Mets	Houston	Home	2:00 PM
Thurs.	18	Mets	Cincinnati	Away	7:30 PM
Sat.	20	Mets	Atlanta	Away	7:30 PM
Sun.	21	Mets	Atlanta	Away	2:00 PM
Tues.	23	Mets	Montreal	Away	7:30 PM

					NYCT
JUNE					
Fri.	26	Mets	St. Louis	Home	8:00 PM
Sat.	27	Mets	St. Louis	Home	7:00 PM
Tues.	30	Mets	Chicago	Home	8:00 PM
JULY					
Wed.	1	Mets	Chicago	Home	8:00 PM
Sat.	4	Mets	Pittsburgh	Away	5:00 PM
Sun.	5	Mets	Pittsburgh (DH)	Away	1:00 PM
Tues.	7	Mets	St. Louis	Away	8:30 PM
Thurs.	9	Mets	St. Louis	Away	8:30 PM
Fri.	10	Mets	Philadelphia	Away	8:00 PM
Sat.	11	Mets	Philadelphia (DH)	Away	5:30 PM
Sun.	12	Mets	Philadelphia	Away	1:30 PM
Fri.	17	Mets	San Diego	Home	8:00 PM
Sat.	18	Mets	San Francisco	Home	7:00 PM
Sun.	19	Mets	San Francisco	Home	2:00 PM
Wed.	22	Mets	Los Angeles	Home	8:00 PM
Fri.	24	Mets	San Diego	Away	10:00 PM
Sat.	25	Mets	San Diego	Away	10:00 PM
Sun.	26	Mets	San Diego	Away	4:00 PM
Tues.	28	Mets	Los Angeles	Away	10:30 PM
Wed.	29	Mets	Los Angeles	Away	10:30 PM
Fri.	31	Mets	San Francisco	Away	10:30 PM
AUGUST					
Sat.	1	Mets	San Francisco	Away	4:00 PM
Sun.	2	Mets	San Francisco	Away	4:00 PM
Fri.	7	Mets	Pittsburgh	Home	8:00 PM
Sat.	8	Mets	Pittsburgh	Home	2:00 PM
Tues.	11	Mets	Chicago	Away	2:30 PM
Fri.	14	Mets	Philadelphia	Home	8:00 PM
Sat.	15	Mets	Philadelphia	Home	4:00 PM
Sun.	16	Mets	Philadelphia	Home	2:00 PM
Tues.	18	Mets	Atlanta	Away	7:30 PM
Sat.	22	Mets	Cincinnati	Away	7:00 PM
Sun.	23	Mets	Cincinnati	Away	2:15 PM

					NYCT
AUGUST					
Tues.	25	Mets	Houston	Home	8:00 PM
Wed.	26	Mets	Houston	Home	8:00 PM
Fri.	28	Mets	Cincinnati	Home	8:00 PM
Sat.	29	Mets	Cincinnati	Home	7:00 PM
Sun.	30	Mets	Cincinnati	Home	2:00 PM
SEPTEMBER					
Tues.	1	Mets	Houston	Away	8:30 PM
Wed.	2	Mets	Houston	Away	8:30 PM
Sat.	5	Mets	Atlanta	Home	2:00 PM
Sun.	6	Mets	Atlanta	Home	2:00 PM
Wed.	9	Mets	Pittsburgh	Away	7:30 PM
Fri.	11	Mets	St. Louis	Away	8:30 PM
Sun.	13	Mets	St. Louis	Away	2:15 PM
Tues.	15	Mets	Philadelphia	Home	8:00 PM
Wed.	16	Mets	Philadelphia	Home	8:00 PM
Sat.	19	Mets	St. Louis	Home	2:00 PM
Sun.	20	Mets	St. Louis	Home	2:00 PM
Mon.	21	Mets	Pittsburgh	Home	8:00 PM
Sat.	26	Mets	Montreal	Away	1:30 PM
Sun.	27	Mets	Montreal	Away	1:30 PM
Wed.	30	Mets	Chicago	Home	8:00 PM
OCTOBER					
Sat.	3	Mets	Montreal	Home	2:00 PM
Sun.	4	Mets	Montreal	Home	2:00 PM

EASTERN MICROWAVE, INC.
3 NORTHERN CONCOURSE
P. O. BOX 4872
SYRACUSE, NEW YORK 13221
315/455-5955

October 30, 1979

Mr. Fred Hill
LBJ Co.
Box 1209
Austin, Texas 78767

Dear Mr. Hill,

I would like to take this opportunity to introduce you to the wonderful World of WOR-TV from New York City. WOR is an independent station owned by RKO General and is one of the leading independents in the country. Let me list some of the important features of WOR:

1. 24 HOUR INDEPENDENT PROGRAMMING.

2. OVER 250 PROFESSIONAL SPORTING EVENTS.

—New York Mets Baseball.....	120 games.
—New York Islanders Hockey...	25 away games.
—New York Rangers Hockey	32 away games.
—New York Knicks Basketball..	28 away games.
—New Jersey Nets Basketball....	15 away games.
—New York Cosmos Soccer.....	13 games.
—Harness Racing.....	104 nights from Yonkers.
—Penn State Football (delayed Monday Nights).....	11 games.

3. 63 HOURS OF MOVIES A WEEK.

—Approximately 3000 film library—includes RKO Archives of Golden Oldies

4. THREE FIRST RUN GAME SHOWS:

—Tic Tac Dough
—Jokers Wild
—Dating Game

5. NON DUPLICATION

One of the most important things for you is that WOR does not duplicate WTBS or WGN anytime, any day. This allows you to give your subscribers what they want and need: **SOMETHING DIFFERENT.**

6. SIX HOURS DAILY OF LOCAL ORIGINATION.

—Joe Franklin Talk Show With Celebrities Visiting New York City.
—Romper Room
—Straight Talk Womans Show
—News

FULL TIME HERE ARE THE RATES

Our Tariff is 10¢ per subscriber for full time—$100 minimun and $3000 maximum, with 15% discount for annual prepayment.

SUBSTITUTE

Are you restricted by the F.C.C. distant signal regulation? **WHY NOT PUT WOR ON FOR SUBSTITUTE PROGRAMMING.** Fill in those blackout periods for 1¢ per subscriber, minimum $100, maximum $300, for up to 60 hours a month.

LATE NIGHT:

How about a late night package of all night movies for 2¢ per sub, minimum $100 and maximum $600? This includes three movies & news.

WOR AND EASTERN MICROWAVE, HAVE IT ALL. Jump on the WOR Bandwagon and see the WORld of difference.

Write or call me at (315) 455-5955.

HOPE TO HEAR FROM YOU SOON!!!!

Sincerely,

DIANE MILLEK
Marketing
Eastern Microwave, Inc.
A Division of Newhouse Broadcasting

DM:al

January 27, 1966

Herbert Fuchs, Esq.
Counsel, Subcommittee No. 3
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Dear Mr. Fuchs:

I am writing this letter on behalf of The American Telephone and Telegraph Company to call the Subcommittee's attention to certain ambiguities which, in the opinion of my client, may result from Section106(b)(3)(B) of the proposed 1965 Copyright Revision Bill as compared with the previous 1964 Draft.

I. You will recall that the 1964 Bill, as originally drafted, included in Section 5(b)(3)(B) a definition of performing or exhibiting a work "publicly" which read as follows:

> "to broadcast a performance or exhibition of the work to the public, or to transmit to the public a broadcast of any performance or exhibition *otherwise than as a common carrier;*"

The underscored exception has been eliminated in Section 106(b)(3)(B), which now reads as follows:

> "To transmit or otherwise communicate a performance or exhibition of the work to the public by means of any device or process."

According to the Supplementary Report of the Register of Copyrights, of May 1965, the proposed "definition is intended to cover every transmission, retransmission, or other communication of a performance which reaches 'the public'." The Supplementary Report then states, at page 25:

> "The 1964 bill contained language exempting transmissions by someone acting 'as a common carrier,' the thought being that a corporation merely leasing wires or equipment for the intermediate transmission of signals to other transmitters, rather than to the public, should not be subjected to liability to the copyright owner. It was pointed out that the concept of 'common carrier' might be extended unjustifiably to some commercial transmitters to the public, and we have therefore dropped this exception as ill-advised. *We are convinced that purely intermediate transmissions should be exempt, but that an express exemption is not necessary to exclude them.*"

While it would thus seem at first blush that in the opinion of the Copyright Office, the types of services by telephone companies referred to in the quoted section would be considered "intermediate" transmissions which would be exempt from Section 106, this question is not entirely free from doubt; it is the purpose of this letter, therefore, to recommend that some language be included or reinstated in the final draft of the bill which would explicitly exempt such operations. As pointed out in the attached separate Memorandum entitled "Telephone Company Services," (Appendix 1), some of the numerous services rendered by telephone companies in this area may transcend the concept of "intermediate" transmission, although they undoubtedly may have been intended to be covered thereby.

The attached memorandum suggests that, for the purpose of testing the impact of the proposed copyright legislation on

telephone company services, the latter can be reduced to two types.

In the first of these two types, illustrated at (4) in the memorandum, the telephone company would furnish all of the facilities involved, viz., (1) at the "sending"-end, a teletypewriter, microphone, record player, TV camera, and/or etc. to be used by the customer, (2) a cable connecting the sending-end equipment with (3) a teleprinter, loudspeaker and/or TV receiver at a public place specified by the customer where the public can see and/or hear whatever material the customer presents to the sending-end equipment.

This first type of service has some analogy to the case where a company, pursuant to a customer's order, installs, leases and maintains an organ in a theater. If unlicensed works are played on the organ, the company presumably is not an infringer for the sufficient reason that the company has no control over what works are played. But in treating of communication common carriers, the Supplementary Report finds an express exemption for them unnecessary, not for their lack of control over what works are transmitted but because of the assumed *intermediacy* of their transmissions (page 25).

This first type of service, however, would not appear to involve "purely intermediate transmissions". Looking for the two contiguous transmissions implied by "intermediate", one finds at the sending-end nothing except the customer's operation of the teletypewriter, TV camera or etc., and at the other (public) end there is nothing following the visual or audible reproduction by the telephone company equipment. (Too, this type of service would presumably not qualify as an "intermediate transmission of signals to other transmitters, rather than to the public.")

The second of the two types of service is the service offered to CATV operators, (3) in the memorandum. Here one might easily assume that the transmission by the telephone company

is a "purely intermediate transmission". At least one can identify at the sending-end the CATV operator's antenna and electronic equipment, and at the other end a TV receiver and electrical connections between the receiver and the telephone company's cable. Too, it might be said that the telephone company is engaged in the "transmission of signals to other transmitters, rather than to the public," on the theory that the CATV operator is that "other transmitter" by virtue of its making (or directing its patron to make) the electrical connection between cable and TV receiver.

The question with regard to this second type of service is rather whether the construction that must be put on Section 106(b)(3)(B) to make it applicable to CATV operators, as expressly intended, would make it equally applicable to the foregoing telephone company service.

It must be that the CATV operator is deemed to transmit "to the public" by virtue of the fact that he delivers "signals" (a "transmission embodying a performance or exhibition"?) to the public's TV receivers and despite the fact that he (like the radio broadcaster) does not himself "show images" or "make the sounds available". In the telephone company's service the signals are delivered by the company, if not quite to the patron's TV receiver, to the short pair of wires the CATV operator connects between the company's cable and the patron's receiver. But this simple connection would seem to afford a very feeble and technical basis for making a distinction, and it is entirely possible that in many cases, or in future, the telephone company cable will extend through the patron's premises to his TV receiver thus dispensing with even the short interposed wiring. Query, then, whether in the latter case the telephone company's transmission is not as much "to the public" as the CATV operator's transmission.

At the other end of the CATV system, the CATV operator, in the simplest case, passively transmits without change the

signals received from a preceding signal transmitter, viz., the broadcaster. The telephone company, similarly, passively transmits without change the signals received from a preceding signal transmitter, viz., the CATV operator. Query, then, what it is in the bill that can be relied upon to distinguish between the two operations, that of the telephone company on the one hand and that of the CATV operator on the other.

Apart from the bill, the two operations differ significantly, of course. For one, the telephone company has no control over selection of the material to be transmitted; the CATV operator, on the other hand, selects the material to be transmitted, if only to the extent of selecting the broadcasting transmitter(s) to which his antenna(s) shall be pointed and to which his receiving equipment shall be tuned. For another, the service furnished by the telephone company to the CATV operator is a service which the telephone company is committed, by virtue of the tariff, to furnish on demand to others, i.e., to other prospective *CATV operators* who might also wish to have the telephone company provide *cable distribution networks* for their use. The CATV operator, on the other hand, if deemed to be a common carrier and so required to file tariffs, would not be committed to provide networks for other CATV operators but rather to furnish any prospective *patron* with service and with whatever connections might be required on the premises for such service. For still another, the telephone company's business relations are solely with the CATV operator and not with the latter's patrons.

For these reasons, it is recommended that Section 106(b)(3)(B) should be reworded so as to read:

> "to transmit . . . or communicate . . . otherwise than as a common carrier having no control over the selection of the works to be transmitted or communicated."

The proposed language would not reintroduce as broad an exemption with regard to common carriers as had been included in the 1964 version and would not, therefore, exclude CATV operators generally but would only cover the services of those carriers who have no control whatever over the selection of the transmitted or communicated works.

Respectfully submitted,

.....

Walter J. Derenberg

WJD: DH
enclosure - Appendix 1.

TELEPHONE COMPANY SERVICES

Common carrier communication services of possible interest in the present connection include the following:

1. A first typical service is that furnished by the telephone company to customers engaged in the "wired music" business. Here, in a simple case, the customer operates a record player which delivers sound-bearing electrical signals to an electrical distribution network which is furnished by the telephone company and through which the signals are delivered to restaurants or other public places specified by the customer. Loudspeaking equipment for converting the signals to sound is provided at each such place either by the customer or by *his* customer.

2. Analogous to the "wired music" service are the various closed-circuit television services furnished by the telephone company:

   1. *Theater TV.* The customer provides and operates TV camera and associated equipment at the site of a sporting event, e.g., and there delivers the electrical signals to a distribution network furnished by the telephone company. The signals transmitted through the network are delivered to various theaters specified by the customer. The latter provides and operates equipment at the theaters for translating the signals into images and sounds for the benefit of the theater audiences.

   2. *Educational TV.* This is essentially the same as Theater TV with the theaters replaced by class rooms or auditoriums in school buildings, and the sports event replaced by educational material, filmed, recorded and/or live. The customer may be a Board of Education or a unit of a State government.

   Whether the customer so conducts his operations as to qualify for an exemption under Section 109 is beyond the knowledge and control of the telephone company.

3. *Industrial TV.* As above. Headquarters communicates over telephone company cables with employee assemblages at plants around the country.

3. Still another telephone company service which also involves the furnishing of "channel facilities" to the customer is the electrical transmission service offered to companies in the CATV business. In this case the CATV operator owns and controls the (intercept) antenna and associated electronic receiving equipment; the telephone company owns and controls a distribution network including a cable extending from the antenna, through branch cables, to terminals on the premises of each of the CATV's patrons; and the CATV operator provides each of its patrons with whatever electrical wiring and equipment is needed between its patron's TV receiving set and the aforesaid telephone company cable terminals on the premises.

4. Another class of telephone company service is used typically by customers who are in the business of supplying financial and other news to brokerage houses. The telephone company furnishes its customers with a teletypewriter at the "sending"-end of the system and with teleprinters (a form of electric typewriter) which are placed in the public rooms of the customer's patrons. The telephone company furnishes also cables connecting the teletypewriter with all of the teleprinters, so that whatever message the customer types on the teletypewriter will be printed on paper at each teleprinter for the public (i.e., the broker's customers) to read.

Some or all of the equipment is owned and maintained by the telephone company.

5. A different type of service is represented by the announcement services in which a subscriber to the service can, by appropriate dialing, use his company-provided telephone set to reach a tape recorder in the telephone central office and to record thereon an announcement or other message.

Telephone subscribers who wish to hear the announcement can do so by calling the assigned number(s).

In this case, the "public" is reached seriatim (or a few at a time).

6. The following are general comments on the services enumerated above:

Tariffs

a. All of the services are furnished pursuant to tariffs filed with the appropriate State and Federal regulatory bodies. The charges for any particular service are specified in the tariff. They do *not* vary from one customer to another depending on how profitable or unprofitable the customer's enterprise proves to be.

b. The telephone company charges only *its* customer and not its customer's customer (cf. 1, 2.1 and 3, e.g.).

Equipment

c. The equipment furnished by the telephone company in connection with any of the services is not sold or leased to the customer; the latter has rather the use of such equipment as an incident to the service.

d. Although in describing some of the services, reference is made above to "cables", it should be understood that the cable may include electrical amplifiers at intervals and, at its terminals, coupling equipment for connecting the cable with a customer's own equipment; and that the "cable" may in fact be replaced in whole or part by one or more radio links where long distances are involved.

Control

e. In none of the enumerated services does the telephone company have any control over the possible inclusion of unlicensed copyrighted works in the material its customer selects for transmission.